HASSAN SEMAN & ORS.

v.

JUSOH AWANG KECHIK

FEDERAL COURT, KOTA BHARU
WAN SULEIMAN FJ
SALLEH ABAS FJ
HASHIM YEOP SANI J
[CIVIL APPEAL NO. 207 OF 1979]
6 JUNE & 30 JULY 1981

LAND LAW: *Transfer - Discrepancy between memorandum of transfer and memorial - Finding of District Officer on appeal that discrepancy a mere technical mistake - No order of rectification made - Whether District Officer has power to order rectification - Acceptance of finding of technical mistake by High Court - Principle of indefeasibility of title - Meaning of "an error or omission" - Whether correction of error violates the indefeasibility principle - Land Settlement Ordinance 1955 (Kelantan), ss. 10, 16, National Land Code 1965, ss. 340, 380(1)(c), 417.*

CIVIL PROCEDURE: *Proceedings before High Court - Fresh suit - Whether maintainable - Whether appellants should have proceeded by way of further appeal - Claim based on superior title.*

This was an appeal from the decision of the High Court granting a declaration to the respondent/plaintiff to the effect that he was the owner of half share in a piece of padi land held under Mukim title, and that the other half share belonged to his late brother. The claim was in respect of a superior title based on the register of a title to the land which contained a memorial to the effect that the first owner of the land, Awang bin Salleh, had transferred his whole share to Awang Kechik. The respondent was a son of Awang Kechik. On the death of his father, the land transmitted to the respondent and his brother. The transmission was recorded in the register of tile by virtue of a small estate distribution order.

The appellants, on the other hand, claimed that Awang Salleh had sold only half share in the land to Awang Kechik. On the death of Awang Salleh, the remaining half share transmitted to the appellants in their capacity as son, niece and nephew of the deceased.

The land became the subject matter of an inquiry under s. 5 of the Kelantan Land Settlement Ordinance 1955 ("the Ordinance"). The finding of the District Officer made in respect of the appeal under s. 16 of the Ordinance was that according to the memorandum of transfer, Awang Salleh had transferred to Awang Kechik only half share in the land, but that the discrepancy between the memorandum and memorial was a mere technical mistake. He made an order of possessory titles but took no steps to cause the rectification of the memorial.

The case came before the High Court by way of fresh suit. In the trial before the High Court, the learned Judge made a ruling that a District Officer has no power to order correction of such mistake as the one in the case. However, he accepted the memorial as a mistake but nevertheless gave judgment in favour of the respondent's title was indefeasible under s. 340 of the National Land Code 1965.

Held:

[1] The learned Judge's ruling that a District Officer holding an inquiry or an appeal under the Ordinance had no power to order correction of such mistake as in the case before the Court was *obiter*, as the District Officer had not made any such order and the question of his power did not arise at all.

[2] When the correction relates to a mere technical mistake, indefeasibility of title is not affected. A genuine mistake, not induced by any fraud, can be corrected by the Registrar of Titles as "an error or ommission" within the meaning of s. 380(1)(c), National Land Code.

[3] The question of indefeasibility of title was irrelevant in the case before the Court as the rightful settlement of Awang Kechik was not to the whole land but only to half. The correction of error was only for the purpose of bringing the title in line with the rightful shares of the parties as disclosed in the memorandum.

[4] The High Court could have acted under s. 417, National Land Code and ordered correction of error. In the National Land Code indefeasibility and correction of error are two independent provisions. Correction of error remains outside the scope of the indefeasibility principle and can never be a violation of that principle.

[5] The respondent's title was no better than the appellants' as the respondent too was a volunteer who had inherited from his father whatever share the latter had in the land.

[6] A person claiming superior title under s. 10 of the Ordinance is not precluded from instituting a fresh suit to challenge the order of the District Officer instead of pursuing the matter by way of a further appeal under s. 16 of the Ordinance.

Order:

(1) The Registrar of Titles do make the necessary corrections on the register of title to accord with the memorandum of transfer and subsequent corrections regarding the respondent's and his brother's entitlement.

(2) The possessory titles ordered by the District Officer under the Kelantan Land Settlement Ordinance be amended to reflect the corrections necessary to show the respective shares of the persons interested in the land.

[Appeal allowed with costs.]

Cases referred to:

Sungei Biak Tin Mines Ltd. v. Saw Choo Theng & Anor. (No. 2) [1970] 2 MLJ 226
Dearaman & Ors. v. Mek Yam [1977] 1 MLJ 52
Som binti Daud & Ors. v. Nik Mustaffa bin Nik Idris & Ors. [1978] 1 MLJ 13
Mek binti Idris v. Nor bin Awang [1978] 2 MLJ 257

Legislation referred to:

Land Settlement Ordinance 1955 (Kelantan), ss. 5, 6, 10, 16
National Land Code 1965, ss. 340, 380(1)(c), 417

For the appellant - S.E. Rajah
For the respondent - Datuk Wan Mustapha

JUDGMENT

Salleh Abas FJ:

This is an appeal front the decision of Datuk Mohamed Zahir J granting a declaration to the respondent/plaintiff to the effect that he is the owner of half share in a piece of padi land Lot 576 held under EMR 569 of Mukim Tualang, Bachok and that the other half share belongs to his late brother, Deraman.

The suit of the respondent in respect of which the declaration was given is a claim for superior title based on the register of title to the land which contains a memorial to the effect that the first owner of the land, Awang bin Salleh (herein referred to as "Awang") on 16 January 1929 transferred his whole share in it to a purchaser, named Awang Kechik bin Seman (herein referred to as "Awang Kechik"). The respondent is a son of Awang Kechik. It is the case of the respondent that upon the death of his father the land was transmitted to him and his late brother Draman bin Awang. Such transmission was recorded in the register of title as Pr. 303/1952 Trans 139/1952 on 31 March 1952 by virtue of a small estate distribution order.

The appellants, on the other hand, claimed that Awang, who was the father of appellant (No. 1) and grandfather of appellants Nos. 2 and 3 only sold half share in the land to Awang Kechik and that the remaining half-share, upon the death of Awang transmitted to appellant No. (1) and his late sister, Limah bt. Awang, through whom appellant No. (2) and (3) claimed their shares.

Before the suit was instituted this land was the subject-matter of an inquiry by an Inquiry Officer under s. 5 of the Kelantan Land Settlement Ordinance 1955, and subsequently an appeal was heard by the District Officer under s. 16 of the Ordinance. The finding of the District made in respect of the appeal was that according to the same Memorandum of Transfer Pr. 1791/27 TF 1044/27 of which its memorial was recorded on the register of title Awang only transferred half-share to Awang Kechik. Therefore Awang's name should still remain in the register as owner of half-share. There was no evidence or even a suggestion that there was a fraud as regards memorandum or the memorial, and so the District Officer held that the discrepancy between the memorial and the memorandum was a mere technical mistake.

In the trial before the learned Judge the appellants did not call any witness but relied entirely upon the records of the proceedings before the District Officer, which records contain the evidence of the appellants, the respondents and other witnesses. It is the appellant's case therefore that the memorial on the register of title which says that Awang was the owner of the whole share is a technical mistake and cannot stand in view of the fact that the memorandum of transfer, upon which the memorial depends, says otherwise.

In the appeal under the Kelantan Land Settlement Ordinance the District Officer, despite his finding that the relevant memorial was a technical mistake, took no step to cause its rectification. He was merely content to express this finding, and did nothing else. However he made an order of possessory title on the basis of possession found by him. In the trial before the learned Judge, a ruling was made that a District Officer holding an inquiry or an appeal under the Ordinance has no power to order a correction of such mistake as the one in this case. Counsel for the appellants therefore submitted to us that this ruling was erroneous. For ourselves we do not think that it is necessary to express our opinion upon the ruling or the submission because the District Officer made no such order. The question does not arise at all. Thus whatever ruling expressed in the judgment must therefore be a mere *obiter*.

In the Court below although the learned Judge appears to have accepted the relevant memorial as a mistake, like the District Officer, he made no order to rectify it, but proceeded to give judgment in favour of the respondent. The ground of decision seems to be the indefeasibility of the respondent's title under s. 340 of the National Land Code, despite an error having been found on it. In his judgment the learned Judge states:

> I have to recognise the existing title of the plaintiff (respondent) unless and until it is rectified under due process of the law. As the plaintiff's (respondent's) title is indefeasible under s. 340 of the National Land Code, I ordered that ...

We are of the view that indefeasibility is not affected, when the correction only relates to a mere technical mistake. As has been stated earlier there was neither evidence, nor even a suggestion that the discrepancy between the memorandum of transfer and its memorial on the register was a fraud, it must therefore be a genuine mistake which can be corrected by the Registrar of Title as "an error or omission" within the meaning of s. 380(1)(c) of the National Land Code. In this case indefeasibility is irrelevant and not at all impugned because the rightful entitlement of Awang Kechik was not to the whole land, but only to half-share in it. The correction of error, if ordered, is only for the purpose of bringing the title in line with his rightful share as disclosed in the memorandum. In no sense is this correction to be regarded as a diminution of his share. That Awang transferred only half-share is also confirmed by the finding of the District Officer of the uninterrupted possession of one portion of the land by appellant No. (1) and another portion by appellants Nos. 2 and 3 over a long period of time. It is only the third portion of the land that came under the control of the respondent and the children of his late brother; (defendants Nos. 4, 5, 6, 7 and 8 in the Court below) and even this portion was let out to a tenant farmer, named Hassan bin Adam on a pawah (yield-sharing) system.

In view of all these factors, we feel that the Court below should have acted under s. 417 of the National Land Code. This section says:

> 417(1) The Court or a Judge may by order direct the Registrar or any Collector to do all such things as may be necessary to give effect to any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith.

That the Court has power to order correction of error under this section was clearly expressed by this Court in *Sungei Biak Tin Mines Ltd. v. Saw Choo Theng & Anor. (No. 2)* [1970] 2 MLJ 226, 227. In the National Land Code indefeasibility and correction of error are two independent provisions existing side by side. Each has its own sphere and scope of operation. The provision for correction of an error can never be a violation of the indefeasibility principle. The only care the Registrar of Title or the Court making an order for correction should take is to determine that the mistake is a mere error and that it does not cease to be so and does not become something else. In the present case we are satisfied, just as the District Officer was, that the memorial made on the register of title was an error and not something else. In the circumstances we consider it a proper case to order its correction.

Further the respondent's suit is based on claim for superior title. Yet his title cannot go beyond that of his father, Awang Kechik. The respondent was not a purchaser for value but only a volunteer who inherited from his father whatever share the latter had in the land. Similarly the appellants, too, are mere volunteers. Their claim is based on the title of Awang, whose name, but for the error, should remain on the register as the owner of the other half-share. Thus the respondent's title, in no sense, is higher or better than that of the appellants. In our judgment the respondent's suit should therefore fail.

In this case as stated earlier, the land was the subject-matter of an inquiry and an appeal under ss. 5 and 6 of the Kelantan Land Settlement Ordinance. The case came before the High Court not by way of an appeal against the order of the District Officer as provided by s. 16 of the Ordinance, but by way of a fresh suit. Counsel for the appellant submitted that because the respondent did not lodge a further appeal under s. 16 his suit is not maintainable and that it should be dismissed. In our view this submission is not valid as this Court has on two previous occasions already ruled that a person claiming superior title under s. 10 of the Ordinance is not precluded from instituting a fresh suit to challenge the order of the District Officer instead of pursuing the matter by way of a further appeal under s. 16 of the Ordinance (*vide Deraman & Ors. v. Mek Yam* [1977] 1 MLJ 52, *Som binti Daud & Ors. v. Nik Mustaffa bin Nik Idris & Ors.* [1978] 1 MLJ 13, *Mek binti Idris v. Nor bin Awang* [1978] 2 MLJ 257.

In view of the conclusion we reach in this appeal, we think it fair to both sides that an order be made on the basis that Awang sold only half-share of the land to Awang Kechik and that the Registrar of Titles do make the necessary corrections on the register of title to accord with the memorandum of transfer and subsequent corrections regarding the respondent's and his brother's entitlement. We also order that the possessory titles ordered by the District Officer under the Kelantan Land Settlement Ordinance are to be amended to reflect the corrections so that the respective shares of the persons interested in this land are as set out below:

Respondent	10/40	i.e.	¼ share of the whole land
Defendant	No. 4 2/40)		
Defendant	No. 5 2/40)		
Defendant	No. 6 2/40)	i.e.	¼ share of the whole land
Defendant	No. 7 2/40)		
Appellant	No. 1 10/40	i.e.	¼ share of the whole land
Appellant	No. 2 5/40)		
Appellant	No. 3 5/40)	i.e.	¼ share of the whole land.

This order more or less coincides with the parties' respective possessions of the portions of the land as found by the District Officer. We hope that by this order this long and complicated land dispute between the parties, who are closely related to one another should come to an end and that the parties and others involved should be prepared and minded to come back to terms with one another as they were once before.

The appeal is therefore allowed with costs and the deposit should be refunded to the appellants.

Also found at [1982] CLJ 109